

DATE: January 11, 2005

TO: Members of the Board Committee on Planning, Program Development, and Budget;
Members of the Board Committee on Member Oversight

FROM: Starr Babcock, Special Assistant to the Executive Director;
Mary Yen, Senior Staff Attorney;
Saul Bercovitch, Staff Attorney

SUBJECT: Rules and Regulations of the State Bar of California Article I, Section 2 [Enrollment as an Inactive Member] and Section 7.3 [Waiver of Outstanding Membership Fees for Former Judges] – Request to Release for Public Comment Proposed Amendment of Section 2 and Addition of New Section 7.3

EXECUTIVE SUMMARY

This proposal requests authorization to release for public comment two changes to the State Bar rules and regulations on membership status, and annual fees and penalties.

The first proposal would amend State Bar rules and regulations Article I, Section 2 to clarify the active membership status requirement for members who serve as ADR neutrals.

The second proposal would add a new Section 7.3 to Article I to authorize discretionary waiver of outstanding annual membership fees owed by former judges who have not advised the State Bar of their active or inactive status, on the condition of payment of current annual active membership fees.

For further information on this item, contact Starr Babcock at (415) 538-2070, or by email at Starr.Babcock@calbar.ca.gov; Mary Yen at (415) 538-2573, or by email at Mary.Yen@calbar.ca.gov; or Saul Bercovitch at (415) 538-2306 or by email at Saul.Bercovitch@calbar.ca.gov.

I. PROPOSAL RE THE ACTIVE MEMBERSHIP STATUS OF ADR NEUTRALS

BACKGROUND

In recent years while monitoring the growth of the private ADR industry, the State Bar has noted the concomitant growth in California attorneys who provide services as ADR neutrals while on inactive membership status. The matter was given serious consideration in 1995-1996 when the Supreme Court's Advisory Committee on Judicial Ethics, charged with revising the Code of Judicial Ethics, recommended that the State Bar explore a Rule of Professional Conduct governing lawyers serving as temporary judges. This recommendation ultimately resulted in the Supreme Court's adoption of Rule 1-710, which deals with members who serve as temporary judges, referees, or court-appointed arbitrators. (Attachment A)

As an outgrowth of the work on Rule 1-710, which pertains only to members who serve as a temporary judge, referee, or court-appointed arbitrator pursuant to an order or appointment by a court, the State Bar constituted a working group to examine the role of attorneys in the provision of *private* ADR services. The working group focused on the role of the attorney as arbitrator, mediator, or other neutral in an ADR proceeding.

This working group's study resulted in an internal report in 1996 that identified issues with significant policy implications, including *whether an attorney may serve as an ADR neutral on inactive membership status or whether active membership in the State Bar is required*.

The working group's consideration of the issue was halted in 1998 when the State Bar lost its funding. However, the recent amendment of Business and Professions Code section 6141.1(b)(1) renewed the discussion of the active/inactive membership status issue. Effective on January 1, 2004, the statutory amendment states that a member's "provision of arbitration, mediation, referee or other dispute resolution services" does not qualify the member for the scaling discount on annual membership fees otherwise provide by section 6141.1. (Attachment B)

There appears to be a general misunderstanding of the active membership status that is required of members who serve as ADR neutrals (see Discussion below). Given the misunderstanding, it is proposed that the language of the State Bar's active membership status rule be amended to make it clear that members who serve in the capacity of ADR neutrals must be on active status.

DISCUSSION

1. Services as an ADR Neutral and The Practice of Law.

In California, advocacy on behalf of a party in arbitration is considered to be the practice of law, subject to defined exceptions. This is pursuant to case law (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119) and legislation (California Code of Civil Procedure section 1282.4).

Whether services provided by ADR neutrals constitutes the practice of law is a subject of debate that is complicated by a long history of non-attorneys serving in the neutral capacity in numerous instances. Any effort to define with precision what constitutes the practice of law in this and other contexts has vexed most, if not all, of those who have attempted to address the issue.

It is not necessary to resolve the practice of law issue when focusing on the active/inactive membership status of ADR neutrals who are members of the State Bar. The active membership requirement is *not* dependent on whether or not the activity of the ADR neutral constitutes the practice of law. The State Bar is not rendering an opinion on whether the provision of ADR services constitutes the practice of law.

2. Attorneys as ADR Neutrals: Active or Inactive Membership Status?

Membership status in the State Bar is defined by Business and Professions Code sections 6004-6005 to be either active or inactive. The terms and conditions of inactive status are defined by the Rules and Regulations of the State Bar, Article I, Section 2 [Enrollment as an Inactive Member]. In pertinent part, Section 2 provides:

"Any member of the State Bar not under suspension, who does not desire to engage in the active practice of law in the state, may, upon written request, be enrolled as an inactive

member.... No member of the State Bar practicing law in this state, or occupying a position in the employ of or rendering any legal service for an active member, or occupying a position wherein he or she is called upon to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law, shall be enrolled as an inactive member.”

An attorney who serves as an ADR neutral is likely to use the skills described in Section 2. Attorneys who are ADR professionals often advertise their attorney status (and/or former judicial service) as a benefit to those who retain them to provide ADR neutral services, thus emphasizing that legal skills enhance the process.

The active membership fee assessment is based largely on the cost of administering the State Bar’s regulatory system. The existing membership policy allows an attorney to disassociate from the practice of law without having to resign and then later face reinstatement proceedings. Having ceased to associate with the practice of law an attorney is unlikely to invoke the regulatory jurisdiction of the State Bar and is granted the discounted inactive membership fee rate as an accommodation. The discounted inactive rate (\$50.00 per year contrasted with \$390.00 per year for the active membership rate) is rationally and directly related to the requirement that inactive members distance themselves from the practice of law and not burden the State Bar’s regulatory system, since inactive members no longer share the cost of the regulatory system.

In contrast, the attorney who ceases the active practice of law, but continues to remain “in the employ of” a member, or “render any legal services for” a member, or “give legal advice or counsel”, or “examine the law or pass upon the legal effect of any act, document or law” engages in conduct so closely related to the practice of law that demands upon the State Bar’s regulatory jurisdiction are more likely. Because ADR neutral services are closely related to the practice of law, there is a likelihood of complaints to the State Bar’s discipline office, Client Security Fund claims or other demands on the State Bar’s regulatory jurisdiction regarding the conduct of members who provide these services. The active/inactive membership policy reflects the assessment of members for the burden of the State Bar incurring regulatory costs for member conduct. A member is required to pay the full active membership fee whenever the member engages in conduct associated with the practice of law, whether or not the conduct itself constitutes the practice of law *per se*.

3. Regulation of ADR Neutrals.

Non-attorney ADR neutrals are not subject to the State Bar’s regulatory jurisdiction. Attorneys, whether active or inactive, are subject to the State Bar’s regulatory jurisdiction to the extent they engage in conduct governed by the Rules of Professional Conduct and other regulatory authorities.

The professional responsibilities of a lawyer do not turn on whether the lawyer acts as a lawyer in the strictest sense. As observed in *Libarian v. State Bar* (1943) 21 Cal.2d 862, 865, “One who is licensed to practice as an attorney in this state must conform to the professional standards in whatever capacity he may be acting in a particular matter.”

Thus, an attorney remains subject to the State Bar’s disciplinary jurisdiction while performing services as an ADR neutral, or in any other professional capacity, to the extent the conduct at issue is governed by the Rules of Professional Conduct or other authorities governing attorneys. Members cease to be regulated only upon their disbarment or resignation from membership in the State Bar of California.

4. Despite Existing Policy, Some ADR Neutrals, Including Retired Judges, Remain on Inactive Status.

The working group's 1996 internal report observed that although members who serve as ADR neutrals are required to be on active status, the State Bar has not been vigilant in enforcing the active membership requirement. A 1996 survey of private ADR neutrals revealed that approximately 50 percent were on active status, 40 percent were on inactive status, and 10 percent were in some other category. The report also observed that the percentage of ADR neutrals providing such services while on inactive status was increasing.

Moreover, former judges are also unclear on the requirement of active status for ADR neutrals. When a member of the State Bar becomes a judge or justice, the individual's membership in the State Bar is stayed. When the judge or justice retires from the judiciary, the State Bar advises this member that, upon retirement, he or she automatically resumes membership in the State Bar and becomes obligated to pay active or inactive membership fees, unless he or she resigns State Bar membership entirely. The communication from the State Bar does not state that if the judge or justice will serve as a private ADR neutral, he or she can do so only as an active member.

In short, although the State Bar has a policy governing inactive status, the policy is widely misunderstood among the State Bar membership, including former judges.

5. Concerns Expressed About Applying the Active Membership Status Policy to Members Who Serve as ADR Neutrals.

ADR neutrals have expressed concerns, summarized below, about application of the active membership status policy to State Bar members who serve as neutrals.

a. The "Practice of Law" Issue

A primary concern is that by requiring arbitrators and mediators to maintain active status, the State Bar is saying (or implying) that mediation and arbitration are the practice of law. There is concern that this will adversely impact attorney neutrals, and also potentially impact non-attorney neutrals with claims that the non-attorney neutrals are engaged in the unauthorized practice of law.

Even if the State Bar explicitly states that the active membership requirement does not depend on whether the activity of the ADR neutral constitutes the practice of law, concerns remain. The existing language in Article I, Section 2 requires active status for an attorney who is "practicing law" as well as one who is "occupying a position wherein he or she is called upon to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law." The language in this second clause is similar to language in some cases that have found certain conduct and activities as practicing law. Therefore, a concern is expressed that the active status requirement for ADR neutrals under the existing language of Article I, Section 2 may indirectly be "defining" mediation and arbitration as the practice of law.

Other concerns are that insurance carriers and potential claimants against neutrals may view the requirement of active status as indicia that ADR neutrals are practicing law, with a potential impact on liability claims and insurance coverage. Carriers may shy away from providing the relatively low cost liability insurance designed for mediators and arbitrators that is available now. Legal malpractice carriers may also think their risk is increased, or that their risk of claims arising out of the practice of law is expanded to include claims against attorneys acting as ADR neutrals.

In response to these concerns, it should be noted that Article I, Section 2 is a membership status rule. The proposed amendment to Article I, Section 2 would clarify that a member is required to maintain active status if the member is “occupying a position wherein he or she provides dispute resolution services such as arbitration or mediation.” The proposed language should address the concern that Article I, Section 2 expressly or implicitly “defines” mediation or arbitration as the practice of law.

b. The “Regulatory” Issue

Concerns have been expressed about the requirement of active status in general. These concerns do not relate to the specific language in Article I, Section 2. Some neutrals, for example, believe the State Bar is looking at the active status requirement to find a way to regulate the conduct of attorneys who are acting as mediators and arbitrators, and some are concerned that there will be more discipline complaints against them if they are on active status. Even when they are made to understand that discipline exposure is the same for active and inactive members, some neutrals seem to feel that requiring ADR neutrals to maintain active status might encourage more complaints, possibly because the neutrals’ customers might believe that the neutrals are practicing law and then think of complaining to the State Bar, where otherwise they would not.

These heightened “regulatory” concerns reflect a basic misunderstanding about the State Bar’s disciplinary system, which focuses on whether the alleged misconduct violates the Rules of Professional Conduct or other governing authorities, rather than on the membership status of the accused member, or on whether the alleged misconduct constitutes the practice of law. Moreover, while access to the Internet allows consumers to be increasingly aware of an attorney’s membership status, for the most part consumers do not base their complaints on the membership status of attorneys, but focus instead on the alleged misconduct itself.

c. MCLE Requirements

Some ADR neutrals may be concerned about the MCLE requirements imposed on active members, while others are not concerned or do not believe this is a primary concern.

d. Financial Issues

The active membership fee amount (currently \$390.00 per year) may be of concern to some ADR neutrals who currently pay the inactive fee amount (\$50.00 per year).

For those ADR neutrals who meet the financial hardship criteria, fee scaling as permitted in Business and Professions Code section 6141.1 allows them to seek a waiver of 25 percent or 50 percent of the annual membership fee.

6. Penalties for Non-Compliance With the Policy.

The penalty for violating inactive status is the revocation of that status. Upon revocation, if an attorney does not activate his or her license, the attorney becomes suspended from the State Bar for nonpayment of active membership fees. Therefore, the member would be out of compliance with the State Bar’s membership status requirement and would be publicly designated by the State Bar as a suspended member not entitled to practice law.

PROPOSAL

As discussed, there is a misunderstanding by ADR neutrals about the active membership requirement. It is proposed that the misunderstanding be addressed by clarifying the language of Article I, Section 2. Under this approach, Article I, Section 2 would be amended as follows (along with an unrelated technical change):

“Any member of the State Bar not under suspension, who does not desire to engage in the active practice of the law in this state, may, upon written request, be enrolled as an inactive member. The secretary or designee shall, in any case in which to do otherwise would work an injustice, and subject to any directions which may be given by the board or by ~~the president and the chair of the Board Committee on Administration and Finance~~ **its designee**, permit retroactive enrollment of inactive members. No member of the State Bar practicing law in this state, or occupying a position in the employ of or rendering any legal service for an active member, or occupying a position wherein he or she is called upon to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law, **or occupying a position wherein he or she provides dispute resolution services such as arbitration or mediation** shall be enrolled as an inactive member.

Nothing in this section shall prohibit the enrollment as an inactive member of a member employed in a quasi-judicial capacity by any governmental agency if he or she does not otherwise engage in the practice of law or hold himself or herself out as being entitled to practice law. A member employed or engaged in the capacity of referee, hearing officer, court commissioner, or in a similar capacity, shall be deemed to be employed in a quasi-judicial capacity.”

[Proposed deletions in strikeout, and additions in bold and underlined. Attachment D]

A benefit of this proposal is that the public comment process gives a structure that will allow members to express themselves on the subject. Moreover, the public comment process provides a means for educating the membership generally about the active membership requirement, and specifically that the policy is broadly based to embrace more law-related activities than the “practice of law.”

II. **PROPOSAL RE WAIVER OF OUTSTANDING FEES FOR SOME FORMER JUDGES**

BACKGROUND

When a member of the State Bar becomes a judge or justice, the individual's membership in the State Bar is stayed under Business and Professions Code section 6002 and the California Constitution, Article VI, Section 9. When the judge or justice retires from the judiciary, the State Bar advises this member that, upon retirement, he or she automatically resumes active membership in the State Bar and becomes obligated to pay active or inactive membership fees, unless he or she resigns State Bar membership entirely.

While the vast majority of judges and justices who leave the bench advise the State Bar that they will resume active or inactive status, some former judges have not responded to the request that was directed to their official State Bar address. These former judges who did not respond to the State Bar defaulted to the active or inactive status they maintained before joining the judiciary.

However, they have not met their obligation to pay outstanding annual membership fees. Cumulatively, some 60-plus retired judges fall into this category.

PROPOSAL

A new rule is proposed to provide a process for these former judges to come into compliance with their State Bar membership fee obligations. New Section 7.3 would be added to Article I to authorize a stated period of time for discretionary waiver of outstanding membership fees owed by former judges on condition of payment of current annual membership fees. The purpose is to encourage these members to meet the financial obligations of their reactivated status as active or inactive members. (See Attachment E)

III. FISCAL/PERSONNEL IMPACT

There is no expected impact on personnel and there may be a slight increase in active member fees.

IV. IMPACT ON THE BOARD BOOK/ADMINISTRATIVE MANUAL

None.

V. PROPOSED RESOLUTIONS

Should the Board Committee on Planning, Program Development, and Budget and the Board Committee on Member Oversight approve the request to release for public comment the proposed amendment regarding the membership status of ADR neutral members of the State Bar, and the proposed authorization to waive outstanding fees owed by former judges, the following resolutions would be appropriate:

RESOLVED that the Board Committee on Planning, Program Development, and Budget and the Board Committee on Member Oversight hereby authorizes staff to make available for public comment for a period of 90 days the proposed revisions to Rules and Regulations of the State Bar of California Article I, Section 2 [Enrollment as an Inactive Member], in the form attached; and it is

FURTHER RESOLVED that the Board Committee on Planning, Program Development, and Budget and the Board Committee on Member Oversight hereby authorizes staff to make available for public comment for a period of 90 days the proposed addition to Rules and Regulations of the State Bar of California Article I, of Section 7.3 [Waiver of Membership Fees and Penalties for Former Judicial Officers], in the form attached; and it is

FURTHER RESOLVED that this authorization for release for public comment is not, and shall not be, construed as a statement or recommendation of approval of the proposed item.